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DATO' SRI MOHD NAJIB HJ ABD RAZAK v. PP

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMED ZAINI MAZLAN J
[CRIMINAL APPLICATION NO: WA-44-117-06-2020]
14 AUGUST 2020

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CRIMINAL PROCEDURE: *Charge – Application to quash/dismiss charge – Applicant charged under s. 23 of Malaysian Anti-Corruption Commission Act 2009 – Allegations that charge was misleading, confusing and did not disclose any offence – Whether s. 173(g) of Criminal Procedure Code applicable – Whether application ought to be allowed*

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CRIMINAL PROCEDURE: *Charge – Application to quash/dismiss charge – Applicant charged under s. 23 of Malaysian Anti-Corruption Commission Act 2009 – Whether application could be made before end of prosecution's case – Whether all witnesses had completed giving evidence – Whether s. 173(g) of Criminal Procedure Code applicable*

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The applicant, former Prime Minister and Minister of Finance of Malaysia, was charged under s. 23 of the Malaysian Anti-Corruption Commission Act 2009 ('Act') for using his position to direct the Auditor General to amend the 1MDB audit report ('report'), before it was presented to the Parliamentary Action Committee, for his own gratification. The trial had already commenced and seven witnesses had given evidence-in-chief for the prosecution. Of these seven witnesses, only three have completed giving evidence. Before reaching its conclusion, the respondent ('prosecution') re-amended the charge to state that the report, which was finalised, was finalised again pursuant to the applicant's instructions ('charge'). In the present application, the applicant sought to have the charge against him be quashed or dismissed on the grounds that: (i) the charge (a) was misleading because the words were confusing as, based on the dictionary definition of 'muktamad' in the charge, a report that has been finalised could not be finalised again; and (b) did not disclose any offence, particularly under s. 23 of the Act, as the charge failed to state the facts constituting the alleged offensive acts emanating from the purported misuses of the applicant's position, which is an essential ingredient to prove the offence under s. 23; and (ii) the evidence by the prosecution's key witnesses did not support the facts alluded to in the charge as the testimonies disclosed that the Auditor General exercised his own prerogative to effect the amendments to the report. The applicant, alluding to s. 173(g) of the Criminal Procedure Code ('CPC'), submitted that this was the appropriate time to make this application as the trial had already begun and the prosecution's key witnesses had already completed their evidence-in-chief.

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Held (dismissing application):

(1) The charge was not misleading. The applicant's contention, that the charge was misleading in that the report could not possibly be subjected to further amendments, was flawed. Contrary to the applicant's contention that the Malay word 'muktamad' has no English equivalent, the Dewan Bahasa Pustaka's translation of the word in English is 'final'. The word 'muktamad' could not be said to have a stricter connotation than the word 'final'. (paras 28 & 30)

(2) Although some of the prosecution's witnesses have completed their evidence-in-chief, the prosecution's case had not come to an end. Cross-examinations have not been completed. Furthermore, even if the witnesses that the applicant had referred to were material witnesses and that the excerpts of their testimonies did not support the prosecution's case, there were other witnesses that the prosecution has yet to call and documents that have yet to be produced. It would not be wise to make a final determination on the prosecution's case at this stage. The grounds submitted by the applicant should only be considered at the end of the prosecution's case for it would be premature for the court, at this stage, to consider them without availing itself of all the evidence that the prosecution would submit. The grounds did not meet the high threshold required to set aside or quash the charge against him. (paras 34, 35 & 40)

(3) The provisions under s. 173 of the CPC were not applicable. Section 173 of the CPC only applies to summary trials by Magistrates. The title to Chapter XIX itself indicates this. The procedure and rules pertaining to trials before the High Court are specifically set out under Chapter XX of the CPC. There is no similar provision like s. 173. The earliest order for an acquittal could only be made at the end of the prosecution's case, if the court finds that the prosecution has not established a *prima facie* case against the accused. The High Court is, nevertheless, empowered to strike out a charge without waiting for the prosecution's case to end. This power lies in its inherent jurisdiction but should only be invoked in rare circumstances where there is a miscarriage of justice. (paras 22-24)

Case(s) referred to:

Ahmad Zubair Hj Murshid v. PP [2014] 1 CLJ 697 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 8 CLJ 934 CA ***(refd)***
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***
PP v. Datuk Wira SM Faisal SM Nasimuddin Kamal [2019] 8 CLJ 827 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173(g)
Malaysian Anti-Corruption Commission Act 2009, ss. 23, 28(1)(c)
Federal Constitution, arts. 105(3), 106

For the applicant - Muhammad Shafee Abdullah, Wan Aizuddin Wan Mohammed, Fazreen Hazrina Rahim, Rahmat Hazlan, Mardhiyah Siraj, Zahria Eleena Redza & Syahirah Hanapiah; M/s Shafee & Co

For the respondent - Gopal Sri Ram, Ahmad Akram Gharib, Rozaliana Zakaria, Mohamad Mustaffa P Kunyalam, Nadia Zulkefli, Hazmida Harris Lee, Yap How Yin & Munira Syahirah Mohamad Kamal; DPPs

Reported by Najib Tamby

JUDGMENT

Mohamed Zaini Mazlan J:

Background Facts

[1] The applicant, a former Prime Minister and Minister of Finance of Malaysia, was charged with an offence under s. 23 of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act 2009"). He now seeks to have the charge against him be quashed or dismissed.

[2] The charge against the applicant was in relation to the audit report done by the Auditor General then (Tan Sri Ambrin Buang), for a company wholly-owned by the Government called 1Malaysia Development Bhd (1MDB'). In gist, the applicant was charged for using his position in the Government, to direct the Auditor General to amend the 1MDB audit report, before it was to be presented to the Parliamentary Action Committee, for his own gratification.

[3] The former Chief Executive Officer of 1MDB, Arul Kanda a/l Kandasamy, was also separately charged with abetting or conspiring with the applicant under s. 28(1)(c) of the MACC Act 2009. Both cases are jointly tried in the High Court.

[4] The initial amended charge against the applicant reads as follows:

> Amended Charge
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> Bahawa kamu di antara 22 Februari 2016 dan 26 Februari 2016, di Kompleks Jabatan Perdana Menteri, Pusat Pentadbiran Kerajaan Persekutuan, di dalam Wilayah Persekutuan Putrajaya, sebagai seorang pegawai badan awam iaitu Perdana Menteri Malaysia dan Menteri Kewangan Malaysia telah menggunakan kedudukan kamu untuk mendapatkan suapan bagi diri kamu sendiri, iaitu, perlindungan daripada tindakan sivil atau jenayah berkaitan peranan kamu di dalam perjalanan operasi Syarikat 1 Malaysia Development Berhad (1MDB), dengan cara mengambil tindakan mengarahkan Laporan Pengauditan 1MDB yang

telah disediakan oleh Ketua Audit Negara dipinda seperti di Lampiran A sebelum laporan berkenaan dimuktamadkan dan dibentangkan kepada Jawatankuasa Kira-Kira Wang Awam Negara (PAC), yang mengenainya kamu secara langsung mempunyai kepentingan, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 23(1) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 (Akta 694) yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

[5] The trial had already commenced, and was still ongoing at the time that this application was filed. Seven witnesses had to date given evidence-in-chief for the prosecution. Of these seven witnesses, only three have completed giving evidence. The prosecution's case has not reached its conclusion.

[6] The events during the trial on the 16 November 2019 seemed to have precipitated the applicant's application. The applicant's counsel had during the course of cross-examining one of the prosecution's witness, Tan Sri Ali Hamsa (formerly Chief Secretary to the Government), showed the latter the amended charge, and focused on the words "sebelum laporan berkenaan dimuktamadkan" (before the report was finalised). The witness agreed with learned counsel for the applicant's suggestion that there was nothing wrong in amending a draft report.

[7] Before the proceedings ended for the day, the prosecution intimated to the court that it intends to amend the amended charge, and indicated what the proposed amendments were. The prosecution had on the following day submitted the re-amended charge. The applicant's counsel took issue and objected to the proposed re-amended charge. One of the complaint was that the amendments made were poles apart from the one that was indicated the day before. The re-amended charge was subsequently allowed after arguments were heard at a later date. The applicant had nevertheless filed this application prior to the court's decision on the prosecution's application to amend the amended charge.

[8] The re-amended charge reads as follows:

RE-AMENDED CHARGE

Bahawa kamu di antara 22 Februari 2016 dan 26 Februari 2016, di Kompleks Jabatan Perdana Menteri, Pusat Pentadbiran Kerajaan Persekutuan, di dalam Wilayah Persekutuan Putrajaya, sebagai seorang pegawai badan awam iaitu Perdana Menteri Malaysia dan Menteri Kewangan Malaysia telah menggunakan kedudukan kamu untuk mendapatkan suapan bagi diri kamu sendiri, iaitu, perlindungan daripada tindakan sivil atau jenayah berkaitan peranan kamu di dalam perjalanan operasi Syarikat 1 Malaysia Development Berhad (1MDB), dengan cars mengambil tindakan mengarahkan Laporan Pengauditan 1MDB yang telah **dimuktamadkan** oleh Ketua Audit Negara dipinda seperti di Lampiran A sebelum laporan berkenaan dimuktamadkan **semula** dan

A dibentangkan kepada Jawatankuasa Kira-Kira Wang Awam Negara (PAC), yang mengenainya kamu secara langsung mempunyai kepentingan, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 23(1) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

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(emphasis added)

I shall for convenience, refer to the re-amended charge as 'the charge'.

The Application

C **[9]** The applicant contended that the charge against him does not disclose any offence, and is therefore oppressive and an abuse of process. The applicant hence seeks to have the charge against him be quashed or dismissed, and in consequence, that he be either discharged and acquitted, or discharged not amounting to an acquittal. The grounds for the application, as gleaned from the written and oral submissions are as follows:

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(i) that the charge is misleading as the words used are confusing;

(ii) that the evidence by the prosecution's key witnesses do not support the facts alluded in the charge; and

E (iii) the charge does not disclose any offence known to law, particularly under s. 23 of the MACC Act 2009, as the charge failed to state the facts constituting the alleged offensive acts emanating from the purported misuse of the applicant's position, which is an essential ingredient to prove the offence under s. 23.

F **[10]** I shall now set out the applicant's grounds in turn.

That The Charge Is Misleading

[11] The applicant contended that the defects in the charge lie with the following phrase:

G ... mengambil tindakan mengarahkan Laporan Pengauditan IMDB yang telah dimuktamadkan oleh Ketua Audit Negara dipinda seperti di Lampiran A sebelum laporan berkenaan dimuktamadkan semula dan dibentangkan kepada Jawatankuasa Kira-Kira Wang Awam Negara (PAC).

H (... by taking action in directing the 1MDB Audit Report that has been finalised by the Auditor General to be amended as set out in Annexure A before the said report was finalised again and presented to the Public Accounts Committee).

[12] The alleged offence stated in the charge pertained to the 1MDB audit I report which was finalised, and subsequently finalised again pursuant to the applicant's instructions. This was allegedly done at the behest of the applicant for his own gratification.

[13] The applicant highlighted the word "dimuktamadkan" (finalised) in the charge. The applicant argued that the definition of "muktamad" in the Kamus Dewan (the Malay dictionary published by Dewan Bahasa dan Pustaka) is "tidak boleh dipinda-pinda lagi" (could not be amended again). The applicant contended that the word "muktamad" has no equivalent in English, and has a stricter connotation than the word "final", which meant that a report that had been "muktamad" (finalised), could not be subjected to any further changes. The applicant concluded that the charge is therefore misleading, as a report that has been finalised could not possibly be finalised again.

The Prosecution's Witnesses' Evidence Do Not Support The Facts In The Charge

[14] The applicant contended that the prosecution must prove that he had misused his office and obtained gratification, in order to prove that he had committed an offence under s. 23 of the MACC Act 2009. The prosecution must therefore prove that he had the necessary authority over the Auditor General, or that he had pressured or threatened him to amend the report.

[15] The applicant argued that the powers and security of tenure provided to the auditor general under arts. 106 and 105(3) of the Federal Constitution, meant that the latter was independent and free to act without any interference, including from the applicant, who was then the Prime Minister and also Minister of Finance. The applicant highlighted passages from the witness statement of Tan Sri Ambrin Buang, and two officers from the Auditor General's office to drive home this point. The passages are as follows:

Note

(1) 'KAN' is the abbreviation for Ketua Audit Negara (Auditor General).

(2) 'JAN' is the abbreviation for Jabatan Audit Negara (Auditor General's Office).

(3) Emphasis is by the applicant.

Tan Sri Ambrin Buang

Paragraph 7

KAN berkuasa penuh untuk mendapatkan segala maklumat dan keterangan serta penjelasan dalam menjalankan kewajipannya. KAN berhak memeriksa semua dokumen dan boleh meminta individu tertentu memberi keterangan secara bersumpah serta memberi kuasa kepada mana-mana individu menjalankan penyiasatan dan pemeriksaan bagi pihak beliau. Di samping itu, KAN juga boleh mendapatkan nasihat perundangan bagi menjalankan tugasnya.

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Paragraph 40

Saya mengesahkan bahawa ini adalah laporan audit akhir 1MDB yang disediakan oleh pasukan audit khas JAN. Saya sahkan saya memantau dan menyemak dalam penghasilan laporan audit akhir 1MDB ini. *Saya mengesahkan juga selaku KAN, saya telah meluluskan laporan ini*.

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Paragraph 51

Walaupun begitu, saya telah mengarahkan pasukan audit menghadiri sesi perbincangan bersama Encik Arul Kanda Kandasamy iaitu wakil pengurusan 1MDB. Semasa sesi

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perbincangan tersebut, Encik Arul Kanda telah mengemukakan beberapa maklumbalas terhadap *laporan audit yang telah JAN sediakan. Saya selaku Ketua Audit Negara, mempunyai budibicara untuk, samada menerima dan bersetuju atau tidak menerima maklumbalas yang diberikan oleh Encik Arul Kanda*.

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Paragraph 52

Selepas perbincangan dengan Encik Arul Kanda, *pasukan audit meminta persetujuan saya berkenaan pindaan-pindaan yanq boleh dibuat berdasarkan justifikasi-justifikasi yang telah diteliti secara terperinci. Oleh yang demikian, Laporan Pengauditan 1MDB Jabatan Audit Negara yang telah pun dicetak tidak boleh digunakan lagi kerana terdapat pindaan, dan*

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sava telah pun mengarahkan semua Laporan Pengauditan 1MDB yang telah dicetak dilupuskan kecuali satu (1) salinan untuk salinan Puan Salwani.

Paragraph 79

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Saya mengesahkan bahawa dokumen ini merupakan Laporan Pengauditan 1MDB yang disediakan oleh Pasukan Audit, Jabatan Audit Negara setelah dipinda. *Saya sahkan saya memantau dan menyemak dalam penghasilan laporan pengauditan 1MDB ini. Saya mengesahkan juga selaku Ketua Audit Negara, sava telah meluluskan laporan ini*.

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Saadatul Nafisah binti Bashir Ahmad

Paragraph 35

Setelah mesyuarat tersebut, saya kemudiannya telah berbincang dengan Tan Sri Ambrin dan pasukan khas audit 1MDB di pejabat

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JAN dan Tan Sri Ambrin telah memutuskan untuk menggugurkan perenggan mengenai isu AmBank, CGA dan Acme daripada laporan audit akhir 1MDB setelah mengambilkira justifikasi dalam perbincangan pada 24 Februari 2016.

Paragraph 36

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... selepas mesyuarat tersebut, pada 26 Februari 2016 di pejabat JAN, pasukan khas audit 1MDB termasuk saya dan Tan Sri Ambrin telah berbincang dan *Tan Sri Ambrin telah bersetuju untuk menggugurkan*

perenggan mengenai kehadiran Low Taek Jho dalam mesyuarat lembaga pengarah bertarikh 26 September 2009. Ini kerana beliau menyatakan bahawa pengguguran perenggan tersebut tidak menjejaskan laporan audit akhir 1MDB keseluruhannya dan pihak JAN tidak ada dokumen sokongan untuk menyatakan kehadiran Low Taek Jho benar-benar ada hadir mesyuarat ahli lembaga pengarah tersebut.

Paragraph 42

... setelah mesyuarat tersebut, Tan Sri Ambrin telah berbincang dengan pasukan khas audit 1MDB di pejabat JAN termasuk saya dan *beliau telah memutuskan untuk menggugurkan perenggan mengenai penangguhan pelaburan IMTN daripada laporan audit akhir 1MDB* berdasarkan keputusan yang diberikan oleh Datuk Dzulkifli Ahmad.

Paragraph 61

Setelah mesyuarat tamat, saya dan Tan Sri Ambrin batik ke pejabat JAN dan telah berbincang mengenai perkara tersebut dengan pasukan khas audit 1MDB. *Tan Sri Ambrin telah bersetuju untuk menghadkan skop laporan SRC* kepada tempoh bermula 7 Januari 2011 (iaitu tarikh SRC mula ditubuhkan di bawah 1MDB) sehinggalah 15 Februari 2012 (iaitu tarikh SRC dipindahkan kepada MOF) sahaja atas sebab SRC International bermula 15 Februari 2012 bukan lagi merupakan anak syarikat 1MDB dan dipindahkan ke MOF. Tan Sri Ambrin menyatakan bahawa perkara mengenai SRC International akan diaudit semasa JAN mengaudit syarikat-syarikat Menteri Kewangan Diperbadankan (MKD).

Nor Salwani binti Muhammad

Paragraph 20

Arahan Pengguguran 1 hingga 3 disampaikan oleh Tan Sri Ambrin kepada pasukan audit 1MDB yang terlibat pada mesyuarat dalaman bertarikh 22.02.2016 dan 25.02.2016 yang turut dihadiri oleh Puan Saadatul Nafisah setelah menghadiri mesyuarat yang dipengerusikan oleh mantan KSN pada 24.02.2016 ... (emphasis added)

[16] The applicant contended that the testimonies of the prosecution's witnesses disclose that the Auditor General had exercised his own prerogative to effect the amendments to the 1MDB audit report, before it was tabled to the Public Accounts Committee. This, the applicant argued, proves that the Auditor General had exercised his powers independent from any purported instructions from him as the Prime Minister or Minister of Finance.

That The Charge Does Not Disclose An Offence Known To Law

[17] The applicant contended that the facts set out in the charge do not fulfil the element of "misuse of office" under s. 23 of the MACC Act 2009, as the acts narrated in the charge are not illegal acts, and that the preparation of the audit report was a lawful process.

[18] The applicant highlighted that the audit report, at the time that the alleged offence was committed, was merely a draft, and not "muktamad" (finalised). The applicant alluded to the testimonies of the prosecution's key witnesses in their witness statement to drive home his contention:

Note: Emphasis is by the applicant

Tan Sri Ambrin Buang

Paragraph 10

Selepas selesai proses pengauditan, JAN seterusnya akan mengeluarkan Laporan Audit. Proses pengeluaran Laporan Audit adalah seperti berikut:

(i) Perbincangan dan semakan pemerhatian Audit diadakan di pelbagai peringkat pegawai bagi memastikan "pengauditan dilaksanakan mengikut standard, polisi dan prosedur yang ditetapkan serta mencapai objektif pengauditan;

(ii) Perbincangan dengan auditi melalui Exit Conference mengenai penemuan, penilaian, kesimpulan dan syor audit; dan

(iii) *Draf Laporan KAN berhubung perkara yang dilaporkan dikemukakan kepada Ketua Kementerian/Jabatan/Agensi untuk disemak. Maklum balas perlu dikemukakan dalam tempoh dua (2) minggu dari tarikh draft Laporan dihantar kepada Ketua Kementerian/Jabatan/Agensi berkenaan. Draf Laporan akan dimuktamadkan dengan mengambil kira maklum balas yang diterima daripada pihak agensi (confirmation letter).*

Paragraph 20

Tempoh perlaksaan Pengauditan 1MDB adalah bermula pada *9 Mac 2015 hingga 4 Mac 2016* iaitu tarikh memulakan pengauditan hingga tarikh pembentangan dan penyerahan laporan pengauditan 1MDB kepada PAC oleh saya ...

Paragraph 39

Pada 20 Februari 2016, saya telah mengarahkan *draf laporan audit akhir* 1MDB dihantar untuk dicetak oleh Puan Nor Salwani Muhammad kerana pada ketika itu, laporan tersebut telah muktamad. Sebanyak 60 naskah laporan audit akhir 1MDB tersebut telah siap dicetak pada 21 Februari 2016 dan disimpan di pejabat CGSO bagi tujuan keselamatan. Selepas itu, sebanyak sepuluh (10) salinan dibawa balik ke JAN pada 22 Februari 2016 dan enam (6) salinan diserahkan kepada KAN, dan empat (4) lagi disimpan di dalam peti besi Penyelaras iaitu Puan Nor Salwani. Laporan audit akhir 1MDB tersebut telah diputuskan oleh JAN untuk dibentangkan pada 24 Februari 2016.

Saadatul Nafisah binti Bashir Ahmad

Paragraph 24

Mengikut prosedur pengauditan JAN, sebelum pencetakan draf laporan audit akhir dilakukan, pihak JAN akan menghantar satu Salinan draft tersebut yang hendak dicetak kepada auditi, stakeholder dan kepada

Menteri yang bertanggungjawab untuk penyemakan terakhir dan pengesahan. Jika terdapat pembetulan atau hendak melakukan penambahan atau pengguguran, ianya boleh dilaksanakan dengan memberi bukti dan sokongan yang sahih. Selain itu, mengikut Standard Operating Procedure (SOP) JAN, satu salinan draf audit kepada menteri yang bertanggungjawab dan dalam hal ini ialah Menteri Kewangan iaitu Dato' Seri Najib Bin Razak (Dato' Sri Najib). Dalam hal ini juga saya bersetuju untuk menyerahkan tersebut kepada Tan Sri Shukry atas arahan Tan Sri Ambrin kerana saya beranggapan beliau hendak membaca dan membentangkan kepada Dato' Sri Najib selaku Menteri Kewangan pada masa itu.

Nor Salwani binti Muhammad

Paragraph 16

Saya merujuk kepada Laporan Pengauditan 1Malaysia Development Berhad (1MDB) Jabatan Audit Negara dengan Watermark nombor 09. Dokumen ini merupakan Laporan Pengauditan 1MDB yang disediakan oleh pasukan Audit, Jabatan Audit Negara. Saya mengesahkan ini adalah Laporan Audit 1MDB yang dijalankan oleh JAN yang telah melalui proses Exit Conference di antara JAN dan 1MDB pada 16 Disember 2015. *Saya sahkan laporan dengan watermark 09 ini adalah salah satu draf laporan yang selesai dicetak pada tarikh 21 Februari 2016.* (emphasis added)

[19] The applicant takes the position that the amendments carried out by the Auditor General were therefore done lawfully, as the audit report was at the material time still a draft. The applicant concluded that the allegation against him in the charge does not disclose an offence in law, particularly under s. 23 of the MACC Act 2009.

[20] In conclusion, learned counsel for the applicant had during the course of submissions submitted that this was the proper time to make the application, and alluded to s. 173(g) of the Criminal Procedure Code ("CPC"). The section reads as follows:

CHAPTER XIX

SUMMARY TRIALS BY MAGISTRATES

Procedure in summary trials

173. The following procedure shall be observed by Magistrates in summary trials:

...

(g) Nothing in paragraph (f) shall be deemed to prevent the Court from discharging the accused at any previous stage of the case if for reasons to be recorded by the Court it considers the charge to be groundless.

[21] Learned counsel submitted that this was the appropriate time to make this application, as the trial had already begun, and that the key witnesses of the prosecution had already completed their evidence-in-chief. The case of *PP v. Datuk Wira SM Faisal SM Nasimuddin Kamal* [2019] 8 CLJ 827 (HC), amongst others, were referred to. Justice Collin Lawrence Sequerah J had in that case held that evidence must be led first, in order for the court to consider whether there are sufficient reasons to discharge the accused before the prosecution ends its case under s. 173(g) CPC.

Findings

[22] I am firstly disinclined to accept the applicant's proposition that the provisions under s. 173 of the CPC are applicable. 1 am more inclined to agree with the prosecution's proposition that s. 173 only applies to summary trials by magistrates. The title to Chapter XIX itself indicates this. The cases that the applicant had referred to were concerned with trials that were conducted in the subordinate courts. I must however add that learned counsel for the applicant had no issues with the prosecution's view.

[23] The procedure and rules pertaining to trials before the High Court are specifically set out under Chapter XX of the CPC. There is no similar provision like s. 173. The earliest order for an acquittal could only be made at the end of the prosecution's case, if the court finds that the prosecution has not established a *prima facie* case against the accused.

[24] The High Court is nevertheless empowered to strike out a charge without waiting for the prosecution's case to end. This power lies in its inherent jurisdiction. This was established by the Supreme Court in *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 (SC). The apex court however cautioned that this power should only be invoked in rare instances where there is a miscarriage of justice.

[25] This view was shared by the Court of Appeal in *Ahmad Zubair Hj Murshid v. PP* [2014] 1 CLJ 697; [2014] 1 MLJ 624 (CA). The appellate court further held that the High Court has the inherent jurisdiction to set aside and quash a charge that is oppressive and an abuse of the court's process.

[26] I shall now address the applicant's grounds in turn.

Whether The Charge Is Misleading

[27] In essence, the alleged offence stated in the charge pertained to the 1MDB audit report, which the prosecution contended was finalised, and subsequently finalised again pursuant to the applicant's instructions.

[28] The applicant's contention that the charge is misleading, in that the audit report could not possibly be subjected to further amendments is flawed. Contrary to the applicant's contention that the Malay word "muktamad" has no English equivalent, the Dewan Bahasa Dan Pustaka's translation of the word in English is "final". The word "muktamad" therefore could not be said to have a stricter connotation than the word "final".

[29] The applicant could nevertheless argue that a "final" report could not be subjected to any further changes, and still contend that the charge is misleading, as a report that has been finalised could not possibly be finalised again. This however seems to be the crux of the prosecution's case, as the accusation levelled against the applicant is that he allegedly took steps to direct the final report be amended, when it had already been allegedly finalised. There will subsequently be a need for the court to ascertain whether the report was indeed finalised, and if so, whether it was amended, or as the prosecution has framed it "finalised again", pursuant to the applicant's bidding.

[30] I am therefore of the view that the charge is not misleading.

That The Prosecution's Witnesses Evidence Do Not Support The Facts In The Case And That The Charge Does Not Disclose An Offence Known To Law

[31] I will address the second and third grounds simultaneously, as both grounds share a common trait, in that the applicant had sought to rely on the evidence given during trial.

[32] I noted however that the applicant's third ground, in that the charge does not disclose an offence known to law, seems to be in contrast with his first ground, as the applicant now contends that the amendments carried out by the Auditor General were lawfully done, as the audit report at the material time was still a draft.

[33] Be that as it may, it would be best that I address both grounds simultaneously, as the applicant had meticulously referred to excerpts of the prosecution's key witnesses' testimonies to support these two grounds.

[34] I am mindful of the fact that although some of the prosecution's witnesses have completed giving their evidence-in-chief, the prosecution's case has not come to an end. The witnesses that the applicant had referred to have not finished giving their evidence, in that the cross-examinations have not been completed. As the norm, a witness could only be said to have completed giving evidence in a trial upon the completion of the re-examination. Would it be wise to make a final determination on the prosecution's case at this stage? I think not.

[35] What the applicant has done in referring to some of the witnesses testimonies is akin to a snapshot of the case. It does not give an absolute picture of the prosecution's case. It is similar to piecing together some pieces of the jigsaw puzzle, where it will merely amount to giving a semblance of what the finished product could be, but stops short of giving one a complete picture. Even if the witnesses that the applicant had referred to were material witnesses, and that the excerpts of their testimonies do not support the prosecution's case, there are other witnesses that the prosecution has yet to call, and documents that have yet to be produced.

[36] It would be hazardous for the court to speculate on the outcome of the prosecution's case at this stage. The outcome of the prosecution's case should not, and cannot be done in tranches. It is undesirable for the court to embark on a speculative exercise of determining whether the charge against the applicant is baseless at this juncture, when the prosecution's case has not been completed. It is incumbent for the trial judge to subject all the evidence proffered by the prosecution on a maximum evaluation basis at the end of the prosecution's case, and not on a piecemeal basis. It will be riding rough shod over that duty if it was undertaken prematurely.

[37] The Court of Appeal in *Dato' Seri Anwar Ibrahim v. PP* [2010] 8 CLJ 934 (CA) faced a similar application. The appellant had applied to set aside and quash the charge against him based on a medical report produced during the trial. The appellant there contended that the medical report would exculpate him from the charge. The appellate court in dismissing the appellant's motion agreed with the prosecution's contention that the medical report is not the only evidence that it intends to rely on.

[38] Another case on point is the case of *Ahmad Zubair Hj Murshid v. PP* (*supra*). The appellant had at the outset of the trial took out a notice of motion to set aside and struck out the charges against him, on the basis that the charges were flawed, defective and tantamount to the appellant being charged for an offence unknown to the Penal Code. Although the appellant's case was tried in the Sessions Court, the *ratio* is relevant. Azahar Mohamed JCA (now CJM) delivering judgment for the appellate court, held that it was premature to decide without giving the prosecution the opportunity to conclude its case first. The relevant portion of the judgment is as follows:

> In our view, based purely on the documents that have been supplied by the prosecution to the appellant pursuant to s. 51A of the CPC, it is premature at this early stage of the proceedings for the court to decide on the three issues raised by learned counsel. Documentary evidence must be viewed in the light of the case as a whole and it would be wrong for the court to consider these documents in isolation. The prosecution is entitled to produce these documents during the trial through its relevant witnesses in order to unravel the case for the prosecution in its proper context. The prosecution is entitled to explain through its relevant witnesses, within the limits of the relevant provisions of the Evidence Act 1950, how these documents came into existence and how these documents fit into the prosecution's case. *When the case for the prosecution is concluded, after the prosecution has examined its witnesses, who may in turn be cross-examined and if necessary re-examined, only then the court shall consider based on the entire evidence whether the prosecution has made out a prima facie case against the appellant*. (pp. 705 to 706) (emphasis added)

Conclusion

[39] An application to set side or quash a charge should only be allowed in the rarest of circumstances where there is a miscarriage of justice. It is incumbent on the applicant to show that the charge is oppressive and an abuse of the court's process. What amounts to an oppressive and an abuse of the court's process should be considered on a case-to-case basis, and should not be cocooned in only several aspects. It would suffice to state that circumstances such as a charge based on a non-existent law, or double jeopardy cases would be prime examples.

[40] The grounds submitted by the applicant, as convincing as he thinks they are, should only be considered at the end of the prosecution's case, for it would be premature for the court at this stage to consider them without availing itself of all the evidence that the prosecution will submit. The grounds do not meet the high threshold required to set aside or quash the charge against him.

[41] The applicant's application is therefore dismissed.